

Before the
Administrative Hearing Commission
State of Missouri



DEPARTMENT OF HEALTH & SENIOR
SERVICES,

Petitioner,

vs.

AMY MILLER,

Respondent.

No. 13-0375 DH

DECISION

The Department of Health & Senior Services (“DHSS”) has cause to discipline Amy Miller’s¹ child care license because marijuana and drug paraphernalia belonging to her son were found in her home on two occasions.

Procedure

On November 20, 2012, DHSS sent Ms. Miller a letter informing her it was placing her Family Home Child Care License (“the license”) on probation. On December 18, 2012, Ms. Miller timely appealed the decision to DHSS. On February 28, 2013, DHSS filed a complaint seeking our determination that it had cause to discipline Ms. Miller’s license.

¹ Ms. Miller is now married to a police officer and her name is Amy Miller Brethorst. Because all the documents in the record refer to her as Amy Miller, we do likewise in this decision.

We held a hearing on October 16, 2013. Rachel Meystedt represented DHSS. Patrick J. McCarthy represented Ms. Miller. This case became ready for our decision on February 20, 2014, the date Ms. Miller's written argument was due.

Findings of Fact

1. DHSS issued Ms. Miller a family child care home license for the period from May 1, 2013 through April 30, 2015. She has been a licensed child care provider since about 1992.

2. The license issued by DHSS permitted Ms. Miller to provide care from 6:00 a.m. to 9:00 p.m., for up to ten children from the ages of birth through twelve years with the following additional restrictions:

- if ten children in care, no more than four children under age two with two adult caregivers;
- if six children in care, no more than three children under age two with one adult caregiver; and
- if seven to ten children in care, no more than two children under age two with one adult caregiver;
- if four or fewer children in care, all could be under age two with one adult caregiver.

3. During the relevant period, Ms. Miller provided care for more than four children for compensation at the family child care home in her residence in Maryland Heights, Missouri. The approved child care space in the home was the main floor.

4. On October 11, 2011, a Maryland Heights police officer asked Ms. Miller if he could search her home. Ms. Miller consented to the search.

5. The officer found an electronic scale, drug paraphernalia, two marijuana pipes, three bongs, and several marijuana plants in a basement bedroom of Ms. Miller's home used by her 17-year-old son, Aaron. Most of the drugs and paraphernalia were in his closet.

6. Ms. Miller was unaware that the drugs and paraphernalia were in her basement.

7. On October 26, 2011, DHSS staff received a complaint that Aaron was growing marijuana in the home where her child care facility was located.

8. On October 31, 2011, Beverly Dyson, a child care facility specialist, conducted a complaint investigation at Ms. Miller's home.

9. Ms. Miller told Ms. Dyson that the complaint allegations were not true, and that the police officer who came to her home did not write a police report or find anything of interest.

10. Ms. Dyson contacted the police officer, who told her what had occurred.

11. On November 4, 2011, Ms. Dyson spoke with Ms. Miller again. Ms. Miller told her she had not been truthful before and that the police had searched her home and found the marijuana and paraphernalia.

12. In connection with this incident, DHSS issued a letter of censure against Ms. Miller's license on December 12, 2011. In the letter, Miller was warned that a repeat of these violations or additional violations could result in further disciplinary action.

13. After this incident, Aaron Miller went to live with his father in Iowa. But at some point, he returned to the St. Louis area. He did not live with his mother, but he visited her at times.

14. On June 28, 2012, DHSS received another complaint alleging that the children in care at Ms. Miller's home were in danger because Aaron Miller had illegal drugs in the home.

15. On July 3, 2012, DHSS employees Marla Chrisco and Shalinda Wallace began a complaint investigation at Ms. Miller's home. They inspected the home and saw no evidence of drugs or paraphernalia, or of Aaron's belongings.

16. On July 10, 2012, Maryland Heights police officers again visited Ms. Miller's home. They asked to search the basement area, and again Ms. Miller consented.

17. The officers found a small bag of marijuana and multiple items of drug paraphernalia in the basement, both in Aaron's old bedroom and in the drawer of a chest in the common room. These were not the same items they found in October 2011.² Again, Ms. Miller was unaware that the drugs and paraphernalia were in her basement.

18. On July 23, Ms. Chrisco contacted the Maryland Heights Police Department. She received the police reports from the October 2011 search, and the July 2012 search.

19. On July 30, 2012, after reviewing the reports, Ms. Chrisco and Ms. Wallace returned to the home and spoke to Ms. Miller again. Ms. Miller told them that on July 10, 2012, the Maryland Heights Police, with her consent, searched her home again and found drug paraphernalia.

20. On November 20, 2012, DHSS issued the letter to Ms. Miller placing her license on probation.

Evidentiary Issues

At the hearing, we admitted "substantiated complaint reports" prepared by DHSS employees who testified at the hearing. The reports contain substantial amounts of hearsay. Ms. Miller did not object to the admission of these reports, but she objected to the hearsay contained within them, in particular to the reports of what police officers said to DHSS employees. She relies on two cases to support her argument that while the reports may be admissible, that does not make all of their contents admissible.

Those cases, *Nichols v. Preferred Risk Group*, 44 S.W.3d 886 (Mo. App. S.D., 2001), and *Roy v. Missouri Pacific Railroad Co.*, 43 S.W.3d 351, 359 -360 (Mo. App. W.D., 2001), discuss the business records exception to the hearsay rule contained in § 490.680,³ which does

² The record is not clear, but we presume that Aaron Miller left them there after a visit.

³ Statutory references are to RSMo 2000 unless indicated otherwise

not apply to administrative proceedings. Documents admitted as business records in our proceedings are subject to the rule set forth in § 536.070(10), RSMo Supp. 2013, which states: “All other circumstances of the making of such writing or record, *including lack of personal knowledge by the entrant or maker*, may be shown to affect the weight of such evidence, but such showing shall not affects its admissibility.” (Emphasis added).

We have considered Ms. Miller’s hearsay objection in reviewing the evidence in this case, and have afforded little weight to the hearsay contained therein, except for the statements of Ms. Miller herself. The issue is of little consequence, however, because the police officers who searched Ms. Miller’s home in October 2011 and July 2012 testified under oath at the hearing as to what they found in the home. Their testimony is competent and credible evidence, and we rely on it.

Conclusions of Law

Section 210.221.1(2) gives DHSS the authority to “deny, suspend, place on probation or revoke the license of such persons as fail to obey the provisions of sections 210.201 to 210.245 or the rules and regulations made by the [D]epartment[.]” DHSS filed a complaint with this Commission after Ms. Miller requested a hearing to appeal DHSS’s decision to place her license on probation. Section 210.245.2 provides our jurisdiction to hear this case. We determine whether there is cause to discipline a license; the decision as to the appropriate disciplinary action is reserved to the licensing agency. § 621.110, RSMo. Supp. 2013.

DHSS has the burden of proof to establish by a preponderance of the evidence that there is cause to discipline Ms. Miller’s license. *See Kerwin v. Mo. Dental Bd.*, 375 S.W.3d 219, 229-230 (Mo. App. W.D. 2012). A preponderance of the evidence is “that which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which

as a whole shows the fact to be proved to be more probable than not.” *State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App., W.D. 2000). This burden is met by producing substantial evidence of probative value or by the inferences reasonably drawn from such evidence. *Farnham v. Boone*, 431 S.W.2d 154 (Mo. 1968).

We must judge the credibility of witnesses, and we have the discretion to believe all, part, or none of the testimony of any witness. *Harrington v. Smarr*, 844 S.W.2d 16, 19 (Mo. App., W.D. 1992). Our findings of fact reflect our determination of the credibility of witnesses.

I. Violation of Regulation

DHSS is a state agency created under § 192.005, RSMo Supp. 2013, and vested with the authority to license and regulate child-care facilities under §§ 210.201 through 210.259.

Specifically, the following powers and duties are granted to DHSS under § 210.221.1:

- (1) After inspection, to grant licenses to persons to operate child-care facilities if satisfied as to the good character and intent of the applicant and that such applicant is qualified and equipped to render care or service conducive to the welfare of children, and to renew the same when expired. No license shall be granted for a term exceeding two years. Each license shall specify the kind of child-care services the licensee is authorized to perform, the number of children that can be received or maintained, and their ages and sex;
- (2) To inspect the conditions of the homes and other places in which the applicant operates a child-care facility, inspect their books and records, premises and children being served, examine their officers and agents, deny, suspend, place on probation or revoke the license of such persons as fail to obey the provisions of sections 210.201 to 210.245 or the rules and regulations made by the department of health. The director also may revoke or suspend a license when the licensee fails to renew or surrenders the license;
- (3) To promulgate and issue rules and regulations the department deems necessary or proper in order to establish standards of service and care to be rendered by such licensees to children. . . .; and
- (4) To determine what records shall be kept by such persons and the form thereof, and the methods to be used in keeping such

records, and to require reports to be made to the department at regular intervals.

DHSS, therefore, has the power to discipline a licensee for violating the regulations promulgated by DHSS. The record before us establishes Ms. Miller violated a regulation under which she was required to operate.

Regulation 19 CSR 30-61.085(1)(A)⁴ states: “The premises shall be safe and suitable for the care of children.” “Premises” is defined by 19 CSR 30-61.010(17) as “a house(s), dwelling(s) or building(s) and its adjoining land.”

Ms. Miller argues that, because the drugs and paraphernalia were found only in the basement, which is not an approved child care space, the home was safe and suitable for children, and that the children she cared for were never at risk. But, as DHSS points out, under the regulation, the entire premises must be safe and suitable. DHSS argues that the presence of the drugs and paraphernalia made the premises unsafe and unsuitable because children might wander into unapproved spaces and ingest the drugs, and that selling illegal drugs brings people into the home that may pose a danger to children. As Ms. Miller points out, however, there is no competent evidence that her son was actually selling drugs out of the home.

“Suitable” is not defined in 19 CSR 30-61.085(1)(A). Absent such a definition, we rely on the plain meaning of the word, as found in the dictionary. *See E&B Granite, Inc. v. Dir. of Revenue*, 331 S.W.3d 314, 318 (Mo. banc 2011). The dictionary definition of “suitable” is “appropriate from the viewpoint of propriety, convenience, or fitness.” WEBSTER’S THIRD NEW INT’L DICTIONARY UNABRIDGED 2286 (1986).

Although we agree with Ms. Miller that the actual risk to children in this case seems to have been very small, we must also agree with the Department that the cultivation and presence

⁴ All references to the CSR are to the Missouri Code of State Regulations as current with amendments included in the Missouri Register through the most recent update.

of marijuana on the premises of a child care home renders it inappropriate for children and therefore unsuitable. And even if drugs were not sold out of the home, their very presence carries the risk of other illegal activity. We find that Ms. Miller violated 19 CSR 30-61.085(1)(A).

II. Ms. Miller's Arguments

In Ms. Miller's appeal letter, she expresses concern that the probation placed on her child care license will be posted and available to the public, and has the potential to ruin her business. She argues that she is a long-time child care provider, married to a police officer, and has a good record except for these two incidents. After the first incident in which police found drugs and paraphernalia at her home, her son moved out of her house and has not been a regular presence there. She has cooperated with the police, and feels she did everything she could after the first incident to remediate the situation. She argues that the children she cared for were never in danger.

We agree that these are mitigating factors. However, they are considerations for DHSS in deciding what degree of discipline is appropriate for Ms. Miller. Our task is only to determine whether cause for discipline exists, and we have concluded that it does.

Summary

We find that DHSS has cause to discipline Ms. Miller's family child care home license.

SO ORDERED on March 5, 2014.

/s/ Karen A. Winn

KAREN A. WINN
Commissioner